

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 January 2025

DOCKET NUMBER: AR20240007421

APPLICANT REQUESTS: correction of his retirement orders to reflect his disability is based on injury or disease received in the line of duty (LOD) as a direct result of armed conflict or caused by an instrumentality of war or disability resulted from a combat related injury as defined in Title 26, U.S. Code, section 104.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- self-authored statement
- four Standard Forms 600 (Chronological Record of Medical Care), 3 March 2008 – 9 June 2008
- seven documents titled Medical Record, 3 March 2008 – 7 November 2012
- Lumbar Spine Radiology Results, 6 July 2010
- U.S. Army Physical Disability Agency (USAPDA) Order D156-25 (by way of example; pertaining to another Soldier), 5 June 2015
- Department of Veterans Affairs (VA) Initial Post-Traumatic Stress Disorders (PTSD) Disability Benefits Questionnaire, 27 September 2016
- Headquarters, U.S. Army Cyber Center of Excellence and Fort Gordon Orders 037-0915, 6 February 2017
- VA eBenefits printout, 4 May 2024

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states:

a. His retirement orders do not reflect combat service disabilities. He needs to have them reflect this for his civilian Government retirement benefits. It appears it was an

oversight. He will provide medical documents and Medical Evaluation Board (MEB) paperwork to support his claim.

b. He is providing a sample memorandum reflecting what he needs. He needs a signed memorandum or corrected orders that state the combat service. He is close to retirement as a Government civilian and his human resources office recently discovered the obvious error.

3. The applicant enlisted in the Regular Army on 4 September 1992, and was awarded the Military Occupational Specialty (MOS) 98H (Morse Interceptor).

4. The applicant deployed to Kuwait during the following periods:

- 1 September 1997 – 2 January 1998
- 17 March 1999 – 16 July 1999
- 30 September 1999 – 31 October 1999
- 2 September 2000 – 1 November 2000

5. The applicant's initial DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was honorably discharged after 11 years and 14 days of net active service on 17 September 2003, to accept commission or warrant in the Army.

6. The applicant entered active duty in the Regular Army as a warrant officer on 18 September 2003, in the primary specialty of 170A0 (Cyber Operations Technician).

7. The applicant again deployed to the following locations during the following periods:

- Kuwait, 17 May 2005 – 16 September 2005
- Iraq, 27 April 2007 – 26 October 2007

8. The applicant provided numerous medical documents, from 3 March 2008 – 6 July 2010, all of which have been provided in full to the Board for review and in pertinent part show he was seen and treated on multiple occasions between March 2008 – June 2008 for lower back pain, the result of throwing out his back while on deployment while wearing body armor. Treatment included physical therapy, chiropractic care, and magnetic resonance imaging (MRI), which revealed no significant spondyloarthropathy at any lumbar level.

9. The applicant deployed to Afghanistan from 18 June 2012 -19 July 2012.

10. Multiple additional Medical Records, 11 October 2012 – 7 November 2012, have been provided in full to the Board for review and show in pertinent part, the applicant was seen at the Eisenhower Army Medical Center during this period with complaints of

insomnia, depression, nightmares, anxiety, ringing in the ears, and neck pain. He was diagnosed with adjustment disorder, tinnitus, and anxiety disorder not otherwise specified (NOS).

11. A VA Initial PTSD Disability Benefits Questionnaire, 27 September 2016, shows the applicant was diagnosed with PTSD and adjustment disorder, resulting in occupational and social impairment with reduced reliability and productivity.

12. The applicant's DA Form 3349 (Physical Profile), DA Form 7652 (Disability Evaluation System (DES) Commander's Performance and Functional Statement), Medical Evaluation Board (MEB) Narrative Summary (NARSUM), DA Form 3947 (MEB Proceedings), VA Compensation and Pension (C&P) Exam, and VA Proposed Rating Decision for DES purposes are not in his available records for review and have not been provided by the applicant.

13. A DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings) shows:

a. On 28 December 2016, a PEB convened where the applicant was found physically unfit with a recommended rating of 0 percent and that his disposition be permanent disability retirement.

b. The applicant's unfitting condition is status post appendiceal adenocarcinoma, stage III with appendectomy; status post hemicolectomy post adenocarcinoma of the distal colon, status post removal of adenocarcinoma mass right pelvic area (MEB diagnosis (Dx) 1,2); 0 percent. He reported the onset of this condition in 2012, form severe abdominal pain, cramping, nausea, and vomiting. Despite surgery and chemotherapy treatment, he continued to experience abdominal pain, functional loss and impairment, resulting in the inability to perform his military duties.

c. MEB Dx 3-30 were not unfitting because the MEB indicated they meet retention standards of Army Regulation 40-501 (Standards of Medical Fitness), did not prevent him from performing functional activities and no performance issues were due to these conditions. MEB Dx 3-30 include: left Achilles tendonitis, lumbosacral strain, right plantar fasciitis, left plantar fasciitis, right ear normal hearing, left ear sensorineural hearing loss, tinnitus, sinus bradycardia, benign, right iliopsoas tendonitis, left iliopsoas tendonitis, right knee strain, left knee strain, erectile dysfunction, prostate hypertrophy, cervical strain, right upper and lower extremities polyneuropathy post chemotherapy, left upper and lower extremities polyneuropathy post chemotherapy, PTSD, adjustment disorder, external hemorrhoids, status post appendectomy with scar, laparoscopic hemicolectomy with scars, status post mole excision face with scars, status post portacath placement with chest wall scar, status post hemorrhoidectomy with scar, right shoulder acromioclavicular joint strain, left shoulder acromioclavicular joint strain, eczema scalp, temporomandibular joint dysfunction.

d. Section V (Administrative Determinations) shows:

(1) The disability disposition is not based on disease or injury incurred in the LOD in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war.

(2) The disability did not result from a combat-related injury under the provisions of Title 26, U.S. Code, section 104 or Title 10 U.S. Code, section 10216

e. The applicant signed the form on 29 December 2016, indicating he concurred with the findings and recommendations of the PEB and waived a formal hearing of his case. He also indicated he did not request reconsideration of his VA ratings.

14. Headquarters, U.S. Army Cyber Center of Excellence and Fort Gordon Orders 037-0915, 6 February 2017, released the applicant from assignment and duty because of physical disability incurred while entitled to basic pay and under conditions that permit his retirement for physical disability with a rating of 0 percent, effective 6 April 2017. The orders show his disability is not based on injury or disease received in the LOD as a direct result of armed conflict or caused by an instrumentality of war and incurred in the LOD during a period of war as defined by law and was not the result of a combat-related injury as defined in Title 26, U.S. Code, section 104.

15. The applicant's second DD Form 214 shows he was retired under the provisions of Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation) due to disability, permanent (enhanced), with corresponding separation code SEJ. He was credited with 13 years, 6 months, and 18 days of net active service this period and 11 years and 14 days of prior active service.

16. A VA eBenefits printout, 4 March 2024, shows the applicant was granted a combined 100 percent service-connected disability rating effective 6 April 2017, for the following conditions:

- post-traumatic and tension headaches, 30 percent
- bilateral arcus senilis with unspecified retinal disorder of the left eye, 0 percent
- Achilles tendonitis of the left ankle, 10 percent
- right shoulder acromioclavicular (AC) joint strain (dominant), 20 percent
- polyneuropathy, left upper extremity (hands), 10 percent
- erectile dysfunction, 0 percent
- surgical scars, face, status post mole excisions, 10 percent
- iliopsoas tendinitis of the left hip, 10 percent
- temporomandibular joint dysfunction, 10 percent

- status post appendiceal adenocarcinoma stage III with appendectomy and status post hemicolectomy, post adenocarcinoma of the distal colon, status post removal of adenocarcinoma mass, right pelvic area, 0 percent
- cervical spine strain, 10 percent
- thoracolumbar spine strain, 10 percent
- hemorrhoids, 0 percent
- surgical scars abdomen, status post appendectomy, laparoscopic hemicolectomy, chest, status post porta-catheter placement and hemorrhoidectomy, 0 percent
- left knee strain, 10 percent
- PTSD with adjustment disorder and traumatic brain injury, 70 percent, PTSD-combat
- bilateral plantar fasciitis, 0 percent

17. In the adjudication of this case, an advisory opinion was provided by the USAPDA legal advisor on 14 November 2024, which shows:

- a. The applicant was medically separated and placed into medical retirement for his cancer condition on 5 April 2017. His DA Form 199, Physical Disability Information Report, dated 5 January 2017, and his retirement orders, dated 6 February 2017, do not indicate he was awarded a combat code for his referred, unfitting cancer condition. The applicant reviewed and accepted the findings of the PEB on 29 December 2016.
- b. The applicant provided evidence indicating the VA listed his PTSD as combat-related. He also provided documentation indicating he suffered a back injury while in Iraq. Neither of these conditions were found to be unfitting. Combat codes are only awarded for those conditions found to be unfit. As such, he was not awarded any combat code.
- c. The presented case file does not make clear what if any error the PEB purportedly committed at the time of the applicant's case. The applicant's request to annotate the awarding of a combat code is found to be legally insufficient.

18. The applicant was provided a copy of the USAPDA advisory opinion on 14 November 2024, and given an opportunity to submit comments, but did not respond.

19. The Army rates only conditions determined to be physically unfitting at the time of discharge, which disqualify the Soldier from further military service. The Army disability rating is to compensate the individual for the loss of a military career. The VA does not have authority or responsibility for determining physical fitness for military service. The VA may compensate the individual for loss of civilian employability.

20. Title 38, USC, Sections 1110 and 1131, permit the VA to award compensation for disabilities which were incurred in or aggravated by active military service. However, an award of a VA rating does not establish an error or injustice on the part of the Army.

21. MEDICAL REVIEW:

a. The Army Review Boards Agency (ARBA) Medical Advisor was asked to review this case. Documentation reviewed included the applicant's ABCMR application and accompanying documentation, the military electronic medical record (AHLTA), the VA electronic medical record (JLV), the electronic Physical Evaluation Board (ePEB), the Medical Electronic Data Care History and Readiness Tracking (MEDCHART) application, and the Interactive Personnel Electronic Records Management System (iPERMS). The ARBA Medical Advisor made the following findings and recommendations:

b. The applicant is applying to the ABCMR requesting his unfitting disability be determined to have been combat related.

c. The Record of Proceedings details the applicant's service and the circumstances of the case. His DD 214 for the period of Service under consideration shows he entered the Regular Army on 18 September 2003 and was permanently retired for physical disability on 5 April 2017 under provisions in chapter 4 of AR 635-40, Physical Evaluation for Retention, Retirement, or Separation (19 January 2017).

d. The applicant's Informal Physical Evaluation Board (PEB) Proceedings (DA Form 199) show that on 28 December 2016 his informal PEB determined his "Status post appendiceal adenocarcinoma, stage III with appendectomy, Status post hemicolectomy post adenocarcinoma of the distal colon, status post removal of adenocarcinoma mass right pelvic area" was the sole unfitting condition for continued military service.

e. The medical evaluation board narrative summary had noted the onset of his condition and shows it was not combat related:

"Onset: CW4 [Applicant] had an attack of what appeared to be appendicitis in November 2012. On examination of the removed appendix, an adenocarcinoma was found."

f. The PEB subsequently made the administrative determination the disability was not combat related: They found no evidence that it was the direct result of armed combat; was related to the use of combat devices (instrumentalities of war); the result of combat training; incurred while performing extra hazardous service though not engaged

in combat; incurred while performing activities or training in preparation for armed conflict in conditions simulating war; or that he was a member of the military on or before 24 September 1975.

g. Section b(3) of 26 U.S. Code § 104 requires there be a cause-and-effect relationship in order to establish the finding that a medical condition is combat related:

(3) Special rules for combat-related injuries: For purposes of this subsection, the term "combat-related injury" means personal injury or sickness—

(A) which is incurred—

(i) as a direct result of armed conflict,

(ii) while engaged in extra-hazardous service, or

(iii) under conditions simulating war; or

(B) which is caused by an instrumentality of war.

h. The PEB then applied the Veterans Benefits Administration (VBA) derived rating of 0% and recommended the applicant be permanently retired for physical. On 29 December 2016, after being counseled on the PEB's findings and recommendation by his PEB liaison officer, the applicant concurred with the PEB, waived his right to a formal hearing, and declined to request a VBA reconsideration of his disability ratings (VARR).

i. Review of the submitted documentation, ePEB case file, and AHLTA record found no additional material errors or deficiencies.

j. It is the opinion of the ARBA medical advisor there is no probative evidence the applicant's disability is combat related as defined in Section b (3) of 26 U.S. Code § 104.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military record and

medical review, the Board concurred with the advising official finding no probative evidence the applicant's disability is combat related as defined in Section b (3) of 26 U.S. Code § 104.

2. The Board determined there is insufficient evidence to support the applicant's contention for correction of his retirement orders to reflect his disability is based on injury or disease received in the line of duty (LOD) as a direct result of armed conflict or caused by an instrumentality of war or disability resulted from a combat related injury as defined in Title 26, U.S. Code, section 104. The Board noted, the applicant was counseled on the PEB's findings and recommendation by his PEB liaison officer, and he concurred with the PEB, waived his right to a formal hearing, and declined to request a VBA reconsideration of his disability ratings. The Board agreed with the PEB who subsequently made the administrative determination the disability was not combat related: As such, the Board denied relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

: : : GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

   DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

[REDACTED]

[REDACTED]

[REDACTED]

I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. On 25 August 2017, the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCM/NRs) when considering requests by veterans for modification of their discharges due in whole or in part to: mental health conditions, including post-traumatic stress disorder (PTSD), traumatic brain injury (TBI), sexual assault, or sexual harassment. Boards are to give liberal consideration to veterans petitioning for discharge relief when the application for relief is based, in whole or in part, on those conditions or experiences.
3. Title 10, U.S. Code, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system (DES) and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with DOD Directive 1332.18 (Discharge Review Board

(DRB) Procedures and Standards) and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

- a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with Army Regulation 40-501 (Standards of Medical Fitness), chapter 3, as evidenced in a Medical Evaluation Board (MEB); when they receive a permanent medical profile rating of 3 or 4 in any factor and are referred by an Military Occupational Specialty (MOS) Medical Retention Board (MMRB); and/or they are command-referred for a fitness-for-duty medical examination.
- b. The disability evaluation assessment process involves two distinct stages: the MEB and Physical Evaluation Board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his/her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether or not a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability either are separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a one-time severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.
- c. The mere presence of a medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when a medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. Army Regulation 635-40 establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

- a. Disability compensation is not an entitlement acquired by reason of service-incurred illness or injury; rather, it is provided to Soldiers whose service is interrupted

and who can no longer continue to reasonably perform because of a physical disability incurred or aggravated in military service.

b. Soldiers who sustain or aggravate physically-unfitting disabilities must meet the following line-of-duty criteria to be eligible to receive retirement and severance pay benefits:

(1) The disability must have been incurred or aggravated while the Soldier was entitled to basic pay or as the proximate cause of performing active duty or inactive duty training.

(2) The disability must not have resulted from the Soldier's intentional misconduct or willful neglect and must not have been incurred during a period of unauthorized absence.

c. The percentage assigned to a medical defect or condition is the disability rating. A rating is not assigned until the PEB determines the Soldier is physically unfit for duty. Ratings are assigned from the Department of Veterans Affairs (VA) Schedule for Rating Disabilities (VASRD). The fact that a Soldier has a condition listed in the VASRD does not equate to a finding of physical unfitness. An unfitting, or ratable condition, is one which renders the Soldier unable to perform the duties of their office, grade, rank, or rating in such a way as to reasonably fulfill the purpose of their employment on active duty. There is no legal requirement in arriving at the rated degree of incapacity to rate a physical condition which is not in itself considered disqualifying for military service when a Soldier is found unfit because of another condition that is disqualifying. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

5. Title 10, U.S. Code, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, U.S. Code, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

6. Department of Defense Instruction (DODI) 1332.38 (Physical Disability Evaluation), paragraph E3.P5.2.2 (Combat-Related), covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability shall be considered combat related if it makes the member unfit or contributes to unfitness and was incurred under any of the following circumstances:

- as a direct result of armed conflict

- while engaged in hazardous service
- under conditions simulating war
- caused by an instrumentality of war

7. DODI 1332.38, paragraph E3.P5.2.2.3 (Under Conditions Simulating War), in general, covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live-fire weapons practice, bayonet training, hand-to-hand combat training, rappelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

8. Appendix 5 (Administrative Determinations) to enclosure 3 of DODI 1332.18 (Disability Evaluation System) (DES) currently in effect, defines armed conflict and instrumentality of war as follows:

- a. Incurred in Combat with an Enemy of the United States: The disease or injury was incurred in the LOD in combat with an enemy of the United States.
- b. Armed Conflict: The disease or injury was incurred in the LOD as a direct result of armed conflict (see Glossary) in accordance with sections 3501 and 6303 of Reference (d). The fact that a Service member may have incurred a disability during a period of war, in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.
- c. Engaged in Hazardous Service: Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.
- d. Under Conditions Simulating War: In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, and leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; rappelling; and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.
- e. Caused by an Instrumentality of War: Occurrence during a period of war is not a requirement to qualify. If the disability was incurred during any period of service as a result of wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material, the criteria are met. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in

a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

9. Title 38, U.S. Code, section 1110 (General – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

10. Title 38, U.S. Code, section 1131 (Peacetime Disability Compensation – Basic Entitlement) states for disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

11. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//